



Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

Robert R. Corbin

April 4, 1979

Mr. Donald G. Wiseman, Director
Division of Occupational Safety & Health
Industrial Commission of Arizona
Post Office Box 19070
Phoenix, Arizona 85005

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

Re: I79-096 (R79-038)

Dear Mr. Wiseman:

You have asked for our opinion concerning which state agency should be responsible for enforcing occupational health and safety standards pertaining to smelting operations at mines. You state that the Federal Occupational Safety and Health Administration (OSHA) has suggested that the Arizona Division of Occupational Safety and Health (State OSHA), A.R.S. § 23-401 et seq., should assume jurisdiction. Enforcement traditionally has been the responsibility of the State Mine Inspector pursuant to A.R.S. § 27-302.

After examination of the relevant statutes and regulations, we conclude that there is no legal requirement to shift jurisdiction over smelting operations from the State Mine Inspector to State OSHA. Although such a transfer of responsibility would facilitate necessary enforcement in light of the federal system, revised state legislation would be required to effectuate such a plan.

On the federal level, mining operations historically have been under the jurisdiction of the Department of Interior; but now they are the responsibility of the Department of Labor.

Importantly, smelting operations are under the jurisdiction of OSHA.^{1/} OSHA allows a state to assume responsibility for development and enforcement of occupational and safety issues by submitting a state plan pursuant to 29 U.S.C. § 667. Among the conditions for approval of a plan, as stated therein, the plan must designate "a state agency or agencies as the agency or agencies responsible for administering the plan throughout the state," and must contain "satisfactory assurances that such agency or agencies have or will have . . . qualified personnel necessary for the enforcement of such standards." 29 U.S.C. § 667(c)(1) and (4). There is no prohibition against having more than one agency administer the state plan, so long as qualified personnel are in charge.

The federal regulations relating to state plans, 29 C.F.R. § 1902 et seq. emphasize that a state plan must provide for the development and enforcement of standards which are "at least as effective" as any federal standards that are promulgated.^{2/} They do not specify that a particular agency must have jurisdiction over the standards. The concern is that a state plan will satisfy the objectives of OSHA.

A.R.S. §§ 23-401 et seq. grant authority to State OSHA to oversee occupational health and safety issues. A.R.S. § 23-402 specifically exempts working conditions of miners from coverage under state OSHA and reserves the responsibility for development and enforcement of mining safety standards to the State Mine Inspector.^{3/} The legislative scheme is lawful, since, a state may delegate responsibility to more than one agency; the State Mine Inspector, with his expertise, may properly assume jurisdiction over safety conditions in mines irrespective of whether OSHA has federal jurisdiction.^{4/}

1. The State Mine Inspector was originally granted authority to enforce standards pursuant to 30 U.S.C. § 721 et seq. under the aegis of the Department of Interior. The Federal Mine Safety and Health Act of 1977 (MSHA), 30 U.S.C. § 801 et seq. (1977), superseded the prior Act and resulted in all jurisdiction over mining safety being assigned to the Department of Labor. Under 29 U.S.C. § 653(b)(1), OSHA does not apply to working conditions of employees with respect to which other federal agencies exercise statutory authority to regulate, thus granting authority over mining operations to MSHA; however, OSHA has informed you that an agreement between MSHA and OSHA makes smelters or mine property the responsibility of OSHA.

2. See AFL-CIO et al. v. Marshall, 570 F.2d 1030 (D.C. Cir. 1978), for an excellent discussion of the legislative history and legislative intent of OSHA.

Although the state is not legally bound to confer jurisdiction over smelting operations on State OSHA, there are practical considerations which make this result desirable. Since OSHA has jurisdiction over smelting operations, it would be administratively easier to have State OSHA also have jurisdiction. The responsibility for assuring that the state plan operates in compliance with federal standards would be centrally located.^{5/} Inspectors working under State OSHA

3. The statute reads as follows:

Nothing in this article shall apply to working conditions of employees with respect to which any state agency acting under § 274(b) of the Atomic Energy Act of 1954, as amended, or under title 27, chapter 3, Arizona Revised Statutes, exercises statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

4. OSHA must make a determination on whether to grant final approval to a state plan in accordance with 29 U.S.C. § 667(18)(e). In making an (18)(e) determination, the actual operations of a state plan must be examined to assure that they are "at least as effective as" federal operations. 29 C.F.R. § 1902.30 et seq. If OSHA should find that smelters are not receiving supervision comparable to industries under the direct jurisdiction of OSHA, the state may reassign jurisdiction over smelters in order to obtain certification of the state plan. 29 C.F.R. § 1902.46. (In Arizona, such a reassignment would require legislative activity since A.R.S. § 23-402 vests the State Mine Inspector with the authority to enforce mining safety standards.)

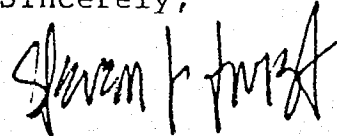
5. If, for instance, supervision by the State Mine Inspector is not in accordance with federal standards, the entire state plan might be in jeopardy and State OSHA would not have authority to remedy the situation. See 29 C.F.R. § 1902.32(e)(b).

Mr. Donald G. Wiseman
April 4 , 1979
Page 4

may be better able to monitor hazards at smelting sites since State OSHA is charged specifically with safeguarding occupational health and safety and must employ personnel who are specially trained to deal with occupational health and safety issues. A.R.S. § 23-407.3.B. Furthermore, if smelting inspectors are under the jurisdiction of State OSHA, a portion of their salary will be paid with federal funds by OSHA. 29 C.F.R. § 1951 et seq.

Based on this review of the applicable federal and state laws, we conclude that the federal act creating OSHA contemplates that states may undertake the responsibility for enforcement of occupational and safety standards provided that a state plan, which may be administered by more than one state agency, is at least as stringent as the federal standards. Thus it is legally permissible that A.R.S. § 23-402 continues the jurisdiction over the enforcement of mining safety standards in the State Mine Inspector even though a reassignment of this authority to the State OSHA would provide consistency in the administration of the state plan, help to assure approval of the state plan, and transfer a portion of the administrative costs to the federal government.

Sincerely,



STEVEN J. TWIST
Chief Assistant
Attorney General

BC/mm